IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 378 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME TAX GUJARAT III AHMEDABAD

Versus

MANHARLAL GIRDHARLAL DOSHIT

Appearance:
MR MIHIR JOSHI with MR MANISH R BHATT for Petitioner
MR KH KAJI for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

Date of decision: 12/12/97

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The Income Tax Appellate Tribunal, Ahmedabad has referred the following two questions for the opinion of this Court under the provisions of Section 256(1) of the Income Tax Act, 1961.

1. "Whether on the facts and in the circumstances of the case the Tribunal was right in law in coming to the conclusion that sum of Rs. 49,819/- was not liable to be included in the income of the assessee under the provisions of Section 60 of the Income Tax Act, 1961?"

2. "Whether on the facts and in the circumstances of the case the Tribunal was right in coming to the conclusion that the sum of Rs. 49,819/- was not liable to be included in the income of the assessee under the provisions of Section 176 of the Income Tax Act, 1961?"

The reference pertains to Assessment Years 1977-78 and 1978-79. The assessee was a partner in the solicitor firm Messrs Bhaishankar Kanga & Girdharlal, from 1st May, 1952 upto 31st December, 1972. After his retirement on 21.12.1972, the assessee was entitled to receive from the said firm his share of profit in respect of the work done prior to the date of his retirement. Admittedly, the accounts of that firm were maintained on cash or receipt basis and the accounting year of the firm was the calendar year.

On 27th December, 1976 the assessee executed a deed of settlement by which he irrevocably assigned to the trustees, his right to receive, recover and realise from the said firm, his share according to the various partnership deeds which were executed from time to time, and all the recoveries for the relevant period already made and not accounted for by the firm prior to 31.12.1995 and thereafter to be made by the firm and all the right, title, interest, claim and demand whatsoever of the assessee. The trust so formed was named as "M.G.Doshit Family Trust" and the three trustees declared that they shall hold the trust property UPON TRUST as envisaged in the deed. This arrangement was made in consideration of the love and affection of the assessee towards his son and daughter. The trustees were entitled to recover and realise the trust property from the firm every year or at such periodical intervals within a year as may be agreed upon from time to time by and between the Trustees and the said firm. As provided under Clause 17 of the deed of settlement, no benefit whatsoever was to be reverted to the settlor directly or indirectly.

In the calendar year 1976, an amount of Rs. 49,890/- became payable by the firm towards the share of the settlor - assessee, who, in view of the settlement, did not include the said amount in his total income, but

claimed in the return that the amount was settled on trust and as such was not liable to be assessed in his hands. Similar stand was taken by the assessee in respect of the amount of Rs. 21,998/- which had accrued for the calendar year 1977. It appears that Gift Tax returns were filed in this regard by the assessee. The ITO rejected the contention raised by the assessee in respect of these two years on the ground that a decision on which reliance was placed by the assessee of the Tribunal in a similar case of Mr. Kanchanlal L. Talsania was not accepted by the Department and further that the amounts in question had accrued to the assessee and by settling the amount on the trust, the assessee had only applied his income after its accrual and therefore, the exclusion of this income from the assessment which was to be made in the hands of the assessee, was not justified.

The Commissioner of Income Tax (Appeals) before whom the matter was carried, accepted the contentions raised by the assessee including the contention that the accrual of income took place only at the end of the year i.e. on the last date of the accounting period, which was 31st December and that in view of the decision of the Supreme Court in CIT Vs. Ashokbhai Chimanbhai, reported in 56 I.T.R 42, the income could not be said to have accrued on the date when the settlement was made i.e. on 27.12.1976. It was therefore held that the basis adopted by the ITO for inclusion of these amounts for the respective years in the assessee's income was not justified.

The Department feeling aggrieved by the decision in appeal, approached the Tribunal and the Tribunal taking note of the fact that in a similar case of another partner of the same firm came to be decided by the Bombay High Court, C.I.T Vs. Kanchanlal L. Talsania reported in 1982 (8) Taxmann page 1 (Bombay), similar contentions were accepted and holding that the amount in question was not determined and could be said to have accrued only when the accounts of the firm were settled which was long after the assessee had retired from the firm and that the assessee had already assigned his right or source of income, dismissed the appeal of the Department.

The learned Counsel appearing for the Revenue strongly contended that there was no diversion of the source of income and the right to recover the amount which already had crystalised, was in issue and the arrangement made by the settlor was only application of the amount which already accrued in his favour. It was

submitted that the fact that these amounts were received at a later date, would not make any difference. It was also submitted that the retired partner alone was entitled to the share in profit and estates and there could be no assignment of his share after his retirement, in view of the provisions of Section 29 of the Partnership Act. It was submitted that fees which were payable in respect of the work done during the period when the assessee was a partner, were clearly ascertainable and the assessee who was a partner alone was entitled to receive his share therein and it is only after it accrued to him that the arrangement made in the deed could take effect and that would amount to only application of income. It was submitted that decision by the Tribunal which was affirmed in K.L.Talsania's case by the Bombay High Court in the case of another partner of the said firm, did not take care of the real issues involved. Reliance was placed by the learned Counsel in support of his contentions on the decisions reported in 222 ITR 456 (CIT Vs. Udayan Chinubhai & ors.); 190 ITR 1 (Motilal Chhadamilal Jain); and 167 ITR 321 (CIT Vs. Banwarilal Agarwala) and 42 ITR 25 (K.A. Ramachar & anr. Vs. CIT).

The learned Counsel appearing for the assessee argued that the only right that the assessee had in the firm after his retirement was of receiving the dues coming to his share and it was assigned. Such assignment of actionable claim was permitted by virtue of the provisions of Sec. 130 of the Transfer of Property Act. This was not a case where any profit was assigned by an existing partner but this was a case where the right to receive a share from the firm was assigned by a partner who already had retired long ago. Reliance was placed in support of these contentions on the decisions of this Court in CIT Vs. Nandiniben Narottamdas, reported in 140 I.T.R 16 and Jyotsnaben Narottamdas Vs. CIT, reported in 142 ITR 91.

As noted above, there is no dispute about the fact that the assessee had retired from the solicitor's firm of M/s. Bhaishankar Kanga & Girdharlal on 31st December, 1972 and that the accounts were maintained by that firm on cash or receipt basis and further that the accounting year was the calendar year, and the accounts were to be settled at the end of the calendar year i.e. 31st December of each year.

The deed of settlement dated 27th December, 1976, which is on record recites that the settlor wanted to irrevocably settle his right to receive, recover and

realise from the said firm his share and the recoveries for the relevant period excluding recoveries already made by the firm upto 31/12/1975. The fact that the assignment was irrevocable, has been mentioned at more than one places in the deed. Reverting any benefit back to the settlor was expressly prohibitted. The deed of assignment was also signed by the trustees. The trustees were the assessee, his wife and Mr. J.M.Thakore.

Under Section 60 of the said Act, it is provided that all income arising to any person by virtue of a transfer whether recovable or not and whether effected before or after the commencement of the Act shall, where there is no transfer of the assets from which the income arises, be chargeable to income-tax as the income of the transferor and shall be included in his total income. The word "transfer" is defined in Section 63 for the purposes of Sections 60, 61 and 62 and it includes any settlement, trust, covenant, agreement or arrangement, as provided in clause (b) thereof.

The object underlying the provisions of Section 60 is to meet with the device which was being adopted by the assessees by which while retaining the interest in the property, its income would be allowed to go to someone else, so that it is not taxed in the hands of the assessee. In such cases, even if the arrangement is made by which the income is received by someone else, by fiction it would be regarded as the income of the transferor and assessed as such. This fiction would operate only when the asset which produces the income still remains the property of the transferor while the income belongs to the transferee. In the present case, from the deed it becomes clear that long after the retirement of the assessee as a partner, he has, without retaining any asset, transferred all his rights and entitlements of the amounts that would come to his share as and when received in future by the firm and becoming payable to the assessee at the end of the accounting year i.e. 31st December. It is evident from the terms of the deed of settlement that there was a valid assignment of the entire right to receive income and the assessee had completely denuded himself of any right whatsoever to get any amount from the firm. On making of the deed of settlement, nothing remained with the assessee and on the established facts, it can never be said that there was no transfer of the assets within the meaning of provision of Section 60. Since the above is the true nature of the transaction, there is no manner of doubt that the assessee had diverted the income producing apparatus or asset by creating an over-riding title in favour of the

said trust. The assessee by executing the deed of settlement which is produced before us, totally divested himself of all his rights to whatever that was to come to his share from the firm and thenceforth, he was no more entitled to receive anything in his name and he did not retain any asset in the firm. The fact that he has acted as one of the trustees and received the amounts for and on behalf of the trust and the beneficiaries would not alter the situation. Since he did not retain any asset with himself so far as the firm is concerned, Section 60 of the Act can have no application to the facts of the present case.

Under Section 130 of the Transfer of Property Act, a provision is made as to transfer of an actionable claim, which would be a claim that the Civil Courts, recognise as affording grounds for relief whether a suit for its enforcement is or is not actually pending or likely to become necessary. On the transfer of an actionable claim, made in consonance with the said provision all the rights and remedies of the transferor vest in the transferee. The assessee having made the said settlement long after the retirement as a partner, transferred his actionable claim in favour of the trust for the beneficiaries. It is not the case of the Department that the settlement deed was not bonafide or that there was no validly executed transfer of actionable claim. The assessee had an absolute right to effect such transfer which he did by the deed of settlement in respect of the amounts that were to come to his share as and when they would accrue at the end of the year when the firm was to settle the account. Since the firm maintained its account on receipts or cash basis, no amount can be said to have been accrued until the firm recovered from its clients and until at the end of the year the accounts were settled. As held by the Supreme Court in CIT Vs. Ashokbhai (supra), it is only when the right to receive the income becomes vested in the assessee that it can be said to accrue or arise. In case of a Partnership firm, the right of a partner to demand his share does not arise until the contingency, which by operation of law or under a covenant of the partnership deed gives right to that right has arisen. The concept of accrual of profits on a business involves their determination by the method of accounting at the end of the accounting year or any shorter period determined by law. In the instant case, there is no dispute about the fact that the accounting year of the solicitor's firm was the calendar year and the account was settled at the end of the year. Therefore, for each calendar year the assessee, prior to the execution of the deed of

settlement, become entitled only at the end of the accounting year, to receive the amount that came to his share. Therefore, even for the calendar year 1976, he would have not become entitled to receive any amount until the end of accounting year i.e 31.12.96. Therefore, the deed of settlement dated 27.12.1996 was executed prior to the accrual of the right in favour of the assessee to receive the amount that would come to his share in respect of the receipts of the firm for the year, 1976.

Since the deed of settlement was executed after the retirement of the assessee from the firm, the question of application of provisions of Sec.29 of the Partnership Act cannot arise. The general provisions of Section 130 of the Act entitles the asessee to assign his actionable claim in favour of any other person and as noted above, the assesse transferred his actionable claim qua the firm in favour of the trust for the benefit of his children, retaining no right or asset whatsoever with him in that firm. In this view of the matter, the decisions on which reliance is sought to be placed on behalf of the Revenue cannot assist the Revenue.

We have come to the above conclusion without resort to the decision which was given in favour of another ex-partner Messrs K.L.Talsania by the Tribunal and which was affirmed by the Bombay High Court by answering the questions in favour of the assessee as per the report of the case in 141 ITR 284 - CIT Bombay Vs. K.L.Talsania. In that case, the facts were almost identical and the High Court after considering a similarly worded deed of settlement, held that the Tribunal was right in holding that such amount could not be assessed in the hands of the assessee - settlor. It was held that the assessee's right to the professional fees by the firm of M/s. Bhaishankar Kanga & Girdharlal, which kept its accounts on cash basis, was in fact an actionable claim capable of being assigned as any other property and that the assessee had before accrual of the income already assigned the source of income irrevocably under the indenture of settlement executed by him. It is pointed out to us from the Digest of Direct Taxes (Taxmann) Vol.I - page 502 that the Special Leavel petition which was filed by the Department against the decision of the Bombay High Court in Talsania's case, was dismissed by the Hon'ble Supreme Court.

On the facts of the present case, it is clear that the income to which the assessee would have become entitled on its accrual at the end of the accounting year

was diverted by him by creating an over-riding title in favour of the trustee. The finding of fact in this regard by the Tribunal can hardly be assailed on any cogent ground. We are therefore of the opinion that the Tribunal was right in coming to the conclusion that the sum of Rs. 49,890/- was not liable to be included in the income of the assessee in view of provisions of Sec.60 of the Act.

We are fortified in our above view by the decisions of this Court in CIT Vs. Nandiniben Narottamdas, reported in 140 ITR 16, Jyotsnaben Narottamdas Vs. CIT reported in 142 ITR 91 and the decision of the Supreme Court in Murlidhar Himatsingka & anr. Vs. CIT, Calcutta - 62 ITR 323.

As regards the second question, it is clear that the provisions of Section 176(4) of the Act had no application to the facts of the present case and rightly therefore, the learned Counsel for the Revenue did not pursue that aspect. The said provision would be attracted where any profession is discontinued in any year on account of the assailment of the provision or for any other reason mentioned therein. As noted above, there is no discontinuation of the provision by the assessee, but carried on this provision in his individual capacity.

Under the above circumstances, the Tribunal was on the facts of the case and in law, justified in holding that the income in question could not be assessed in the hands of the assessee either under Sec.60 or under Sec.176(4) of the said Act. Both the questions referred to us are therefore answered in the affirmative in favour of the assessee and against the Revenue. The reference stands disposed of accordingly.

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